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CONTENTS

The Zimbabwe Law Review is no longer a thing of the past!

You may have been starting to think that the Zimbabwe Law Review had become redundant. One unkind person went as far as to suggest that we should rename our journal "The Historical Law Review" !

Unfortunately we had fallen a few years behind in the production of the Review. The last issue to appear previously was Volume 7 / 8 covering the years 1989 and 1990. The Editorial Board of the Review sincerely apologises to all of valued subscribers and buyers of the Review for the inconvenience caused to them. In order to speed up the process of getting up to date we decided to combine Volumes 9 / 10 (1991 and 1992) of the Review into a single number. Those who have subscribed in advance will be receiving their ordered issues within the near future. The next volume, Number 11 (1993), will be ready for distribution within the next few months. The Editorial Board would like to assure you that in the future the Law Review will be produced on a more regular basis.

We hope that you will renew your interest in this publication by renewing your subscriptions if you have allowed them to lapse. Details of current subscription rates are to be found on the cover of the Review. There is a reduced price for those ordering a set of the Zimbabwe Law Review.

We would like to call for the submission of articles, book reviews and casenotes for consideration for inclusion in this publication. These are momentous times for Southern Africa. Democratic rule has finally come to South Africa after so many years of struggle, suffering and oppression. We would like to take this opportunity to extend our heartfelt congratulations to the people of South Africa on the attainment of their liberation from apartheid rule.

In Southern Africa there is an urgent need to analyse and debate topical matters such as issues relating to development and reconstruction, equitable land redistribution, the impact of economic structural adjustment programmes, the protection of human rights, democracy and constitutionalism and the protection of the environment. We call for the submission of articles on these and other important issues.

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The Editorial Board would like to extend its sincere gratitude to the Raul Wallenberg Institute of the University of Lund in Sweden for its generous donation of desktop publishing equipment to the Faculty of Law of the University of Zimbabwe. This equipment was donated for use in the production of the Zimbabwe Law Review and other Faculty publications. This current number of the Zimbabwe Law Review was produced using this equipment.

THE RELIABILITY OF DECISIONS ABOUT WHOM TO EXECUTE IN ZIMBABWE

by

Geoff Feltoe*

Introduction

The death penalty debate generates a lot of emotional heat. Many people ardently support the retention of the death sentence for murder. The main basis for supporting the use of the death penalty is probably not so much the belief that this penalty is an effective deterrent but rather a deep conviction that the death sentence is a just retribution; murderers have seen fit to kill people and therefore they too deserve to die.

Those opposed to the death penalty argue that it is morally wrong for the State to kill people, no matter how terrible the murders that they have committed; that the whole process of dealing with prisoners condemned to death, and finally executing them, is an extremely sordid one which debases State institutions; that the death penalty has no greater deterrent effect than life imprisonment; that no system of criminal justice is infallible and innocent persons could end up being hanged by mistake.

Even those who, in principle, favour the death penalty, would surely have doubts about its use if they were persuaded that the system under which decisions are made about whom to sentence to death is arbitrary, inconsistent, discriminatory and unreliable. This article seeks to establish that it is doubtful that the current system in Zimbabwe yields consistent and reliable results.

Need for painstaking care in capital cases

In *R v Home Secretary, ex parte Bugdaycay*[1] the House of Lords stressed that the more serious the consequences for a person, the higher will be the standards expected in dealing with his case. It said that:

> The most fundamental of all human rights is the individual's right to life and, when an administrative decision under challenge is said to be one which may put the applicant's life at risk, the basis of the decision must surely call for the most anxious scrutiny.

This statement was made in relation to an administrative decision to deport a person from the country. However, it is even more pertinent to the decision-making process in capital cases. The decision to sentence a person to death should surely only be taken after all reasonable steps have been taken to ensure that the accused person has received a full and fair trial and that all salient facts have been laid before the court.

Internationally it has been increasingly recognised that the more serious the

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1 1987 All ER 840 at 952.

criminal charge a person is facing the greater must be the safeguards to ensure that no miscarriages of justice occur. In 1984 the General Assembly of the United Nations adopted a number of safeguards which were to be applied by all member states still using the death penalty. The safeguards of particular relevance here are these:

4. Capital punishment may be imposed only when guilt of the person charged is based upon **clear and convincing evidence leaving no room for an alternative explanation of the facts.**

5 Capital punishment may only be carried out pursuant to a final judgment rendered by a competent court after legal process which gives all possible safeguards to ensure a fair trial, at least equal to those contained in Article 14 of the International Covenant on Civil and Political Rights, including the right of anyone suspected of or charged with a crime for which capital punishment may be imposed to **adequate legal assistance** at all stages of the proceedings. (My emphasis.)

In 1990 the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders adopted a number of basic principles on the role of lawyers. The General Assembly subsequently called upon all governments to make efforts to ensure the implementation of these principles. The principle pertaining to the criminal justice system states that all persons charged with criminal offences "who do not have a lawyer shall, in all cases in which the interests of justice so require, be entitled to have a lawyer of **experience and competence commensurate with the nature of the offence** assigned to them in order to provide effective legal assistance, without payment by them if they lack sufficient means to pay for such services." (My emphasis)

Additionally it is provided in Article 14(3) of the International Covenant on Civil and Political Rights that a person shall have **the right to have adequate time and facilities for the preparation of his defence** and to communicate with counsel of his own choosing." (My emphasis.)

Fair trial in capital cases

In Zimbabwe the Constitution proclaims that everyone who is charged with a criminal offence is entitled to receive a fair trial. [s 18(2]. The Zimbawean Supreme Court has ruled in a series of cases that in complex and serious criminal matters a fair trial can only be ensured if the accused persons are legally represented. Most persons charged with murder cannot afford to engage lawyers to defend them. The *pro deo* system is a recognition by the State that legal representation is an essential pre-requisite for a fair trial in murder cases. Under this system in capital cases whenever accused persons cannot afford to engage their own lawyers the State pays lawyers to defend them. Thus no person charged with murder is left to fend for himself without the assistance of a lawyer.

Whilst it is commendable that we have a system enabling all persons charged with murder to be legally represented, more is required to ensure a fair trial than simply assigning lawyers to those who cannot afford to engage their own lawyers. In murder cases where the death sentence can be imposed it should surely be required that the legal representation must be of a reasonably adequate quality. It is little benefit to a person on trial for murder, and is sometimes even downright prejudicial to his interests, to assign him a lawyer who is inexperienced, incompetent or totally unmotivated. In line with the international standards referred to above, it is strongly

arguable that adequate legal representation is an essential ingredient of a fair trial and thus that completely inadequate legal representation violates the accused's right to receive a fair trial. Without such a requirement there can be no assurance that any defence will be properly presented and that defence counsel will take all reasonable steps to discover and lay before the court all factors which may be extenuating.

Unfortunately under our present system persons on trial for murder sometimes end up receiving a totally inadequate standard of legal representation.

In the United States of America the highest courts have recognised that a person on trial for murder is not just entitled to legal assistance; he is entitled to **reasonably competent and effective** legal assistance. If the accused receives sub-standard legal representation and the lawyer's deficiencies are prejudicial, the appeal court will set aside the conviction.[2]

Various writers on this subject in the United States have stressed the need for an especially high standard of legal representation in capital cases.[3] Berger[4], a highly experienced criminal lawyer, is particularly scathing about the standard of performance in capital cases assigned to lawyers by the State. He alleges that defence counsel often perform their work so shoddily as to make a mockery of the fair trial guarantees. They frequently "dreadfully fail individuals on trial for their lives." He recites a number of shocking examples of gross dereliction of duty on the part of defence lawyers in such cases. In the light of these examples he argues that where a person is facing the death penalty there should be a higher standard of reliability in his trial; totally inadequate defence work completely undermines the reliability of the outcome. He maintains that it is in relation to the argument about the penalty that defence lawyers most often default with the most fatal results. Just as we do not allow chiropractors to do brain surgery, he says, we should not let " chiropractors" with law degrees perform the equivalent of brain surgery in capital cases because of the predictably fatal results which will follow.

The matter of the adequacy of legal representation has also come up in cases in other countries. In the Jamaican case of *Robinson v Jamaica*[5] the court stressed the need for due process in capital cases and dealt with the issue of an adequate standard of legal representation. Roger Hood[6] points out in his report to United Nations on the death penalty world-wide (pp 45-46) that as a result of the low fees awarded by the State for defence of indigent persons many cases have arisen in which court appointed lawyers were evidently extremely ill-equipped to handle the trial of murder cases.

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2 See cases cited in American articles listed in footnote 3.

3 Cases" 1983 Vol 58 *New York University Law Review* 299-362; Vivian Berger "The Chiropractor as Brain Surgeon: Defense Lawyering in Capital Cases" 1990-91 Volume XVIII No 2 *Review of Law and Social Change* 245; "Attorneys for the Damned" *A B A Journal* 1 Jan 1987; Judith Olmstead "The Constitutional Right to Assistance in a Death Penalty Case" 1985 Vol 23 *Duquesne Law Review* 753-772; R Tabak "The Death of Fairness: the Arbitrary and Capricious Imposition of the Death Penalty in the 1960s" 1983 Vol 14 *New York University Law Review* at 801-810.

4 Berger above footnote 2.

5 Details of of this case are to be found in the 1989 Vol 4 No 1 *Interights Bulletin* 2.

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The quality of criminal defences in capital cases in Zimbabwe

Many legal practitioners assigned pro deo cases take the responsibility of defending persons accused of capital offences very seriously; these lawyers skilfully and conscientiously defend their clients. However, from a reading of the law reports the general standard of defence work in *pro deo* cases is not good and standard of defence work appears to be continuing to decline. For the indigent accused murderer it is very much luck of the draw as to whether he is assigned a competent and conscientious legal practitioner or an inexperienced or irresponsible one. His life may depend upon which type of legal practitioner he gets. There have been some quite appalling examples of gross mismanagement of *pro deo* defences in Zimbabwe. In these cases the Supreme Court has severely criticised the legal practitioners. One example is to be found in the case of *S v Nyandoro*[7]. In that case the defence lawyer pleaded on behalf of his client that his client was guilty of murder with actual intent. The plea tendered by the lawyer completely overlooked the fact that in the defence outline drawn up by the legal practitioner there was a categorical assertion by the accused that he had not intended to kill but had fired the shot in order to frighten away the deceased.[8]

Two factors contribute to the sub-standard defence work evident in quite a number of pro deo cases. *These are* the meagre fees paid to lawyers under the Zimbabwean pro deo system and the failure to lay down any minimum period of experience in practice before lawyers are allowed to take on pro deo cases. The result of these two factors is that pro deo work is often handled by legal practitioners with little or no criminal defence experience. The day after a law graduate has been registered as a legal practitioner he or she is entitled to represent a person charged with murder in the High Court. As this work is so poorly paid, when it is the turn of a particular legal firm to take on a *pro deo* case the senior partners may be inclined to assign it to a junior member of the firm, sometimes without giving any guidance in carrying out the daunting task of defending a person on a capital charge. Even where more experienced legal practitioners do themselves take on these cases, some may be tempted not to devote as much time and effort to these cases as they would to cases in which there are full fee paying clients.

Sub- standard quality of legal representation in pro deo murder cases can lead to gross injustices. There is some danger that wrong people can be found guilty of murders they did not commit. Experience from countries like Britain shows that even in more sophisticated legal systems wrong convictions can occur when, for example, the police see fit to manufacture or distort evidence. There is a far greater danger that factors of extenuation which would have been elicited had a conscientious and competent lawyer represented the accused will not emerge. The result will then be that persons may be sentenced to death even though actually there were extenuating circumstances.

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7 1987 (2) ZLR 66 (S).

8 See G Feltoe & N Mc Nally "Some Aspects of Murder Cases" 1988 Vol 1 No 3. See also such cases as *S v Nangani* 1982 (2) ZLR 150 (S) and S v Dehwe S-137-87.

In order to discover possible extenuating circumstances the legal practitioner needs to be fully conversant with the sort of factors that can constitute extenuation. He then has to probe in detail all the circumstances surrounding the murder and to try to find witnesses who will testify to the accused's version of the events. If, for instance, the accused maintains that he was badly provoked by the deceased, it will be imperative to produce evidence in court to this effect. The legal practitioner must also investigate carefully what sort of personality the accused has and what factors have shaped his personality development because this may be a source of material upon which to base an argument on extenuation. If the facts surrounding the murder suggest that the accused was mentally disturbed at the time or the accused displays signs of mental abnormality or subnormality when interviewed, the defence lawyer has a duty to consider whether some sort of psychiatric investigation should be requested. (This will be dealt with in more detail below.)

The *pro deo* lawyer who is simply going through the motions of defending the accused will be unlikely to perform these important tasks properly and vital factors will not come to light. An example of this is the case of *S v Mlambo*[9]. In this case the Supreme Court found that there were extenuating circumstances despite the fact that the trial court had found that there were none. The Supreme Court stated that the trial court should not simply have agreed with an inexperienced defence counsel that there were no extenuating circumstances; it should have considered itself all salient factors. (The Supreme Court also pointed out that, where there was evidence that the accused had been drinking intoxicating liquor, a trial court should not automatically conclude that an accused was not intoxicated simply because he says he wasn't. Accused often deny intoxication because they think it will be prejudicial to their cases if they admit this.)

The automatic appeal system does not necessarily correct these gross deficiencies in the quality of defence at the trial stage, especially when, as is usually the case, the same lawyer who represented the accused at his trial represents him in his appeal case. The appeal is decided on the record and the appeal court will only call for further evidence or refer the matter back to the trial court in exceptional circumstances. If an indolent and irresponsible defence lawyer has failed to uncover extenuating circumstances and bring forward the evidence of them, the appeal court will be unaware of these features whereas, if they had known about them, it would have set aside the death sentence. Granted the appeal court does sometimes order a psychiatric investigation, when there has not previously been such an investigation. It will only do this, however where it has a strong suspicion from the record that the accused was mentally disordered at the time of the crime. And yet there may well be less obvious psychological features which would, at least, have constituted extenuation had they emerged. The appeal court thus largely depends on defence counsel and the trial court to uncover all possible features which may extenuate. If defence counsel make little effort to uncover these features, then the case may be disposed of without these features ever emerging.

The provision of inferior quality legal representation to persons who cannot afford to engage their own lawyers also means that it is very likely that the death penalty will

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9 1992 (2) ZLR 156 (S).

end up being imposed far more frequently upon the socially disadvantaged. This is discriminatory and arbitrary and in contravention of s 23 of the Constitution and Article 6(1) of the International Covenant on Civil and Political Rights. (The latter says that no one shall be arbitrarily deprived of his life.) As was stated in the one American case[10] "[t]here cannot be equal justice where the kind of trial a person gets depends on the amount of money he has."

Another serious problem in the Zimbabwean system is that indigent accused facing capital charges are assigned pro deo counsel only when their trials are imminent. By this time the police will often have extracted warned and cautioned statements from the accused, frequently of an incriminatory nature. There is no requirement that such accused are entitled be advised by lawyers before giving warned and cautioned statements. Some of these cases are assigned to practitioners a matter of days before the trial thus leaving totally inadequate time for preparation in such serious matters. Where cases are assigned at the last moment, there will be no time to attempt to locate witnesses, especially if the crime occurred in a remote rural place. Clearly responsible practitioners would feel duty bound to apply for a postponement of the case in such circumstances.

On reading some of the cases of murder in Zimbabwe one sometimes feels that the accused persons would have been far better off alone than with ill-prepared and incompetent lawyers who were simply going through the motions of defending the accused. A defence outline prepared on the basis of a half-an-hour interview with the prisoner and the absence of any efforts to locate witnesses is hardly a sound foundation for a proper defence in such cases. Indeed a hastily drawn defence outline is likely to be badly prejudicial to the accused as it is likely to play into the hands of the prosecution by providing a fertile source of ammunition to discredit the defence case.

The present position is unsatisfactory and cannot be allowed to continue. For a person to receive totally ineffective legal representation in a capital case is a violation of the fair trial guarantee. At some stage our Supreme Court should be asked to rule accordingly. If a different legal practitioner represents a person on appeal and he finds that his trial court legal representative rendered incompetent legal representation, he should apply for a setting aside of the trial court's decision and the institution of a new trial on the basis of the breach of the accused's right to a fair hearing. Even after the appeal has been dismissed, there is still scope for argument that the accused's right to a fair hearing was violated as a result of totally inadequate legal representation at both the trial and appeal stages.

There are a number of measures which could be taken to improve the present situation. These are:

Firstly, the fees for *pro deo* work could be increased if the Government was able to find money to do this, which seems highly unlikely in present economic conditions. (The total amount expended by Government on the *pro deo* system in 1991 was Z$ 84 231.)

Secondly, a requirement could be laid down that legal practitioners of less than, say,

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10 *Griffith v Illinois* 351 US 19.

three years practical experience would not be permitted to represent accused in capital cases.

Thirdly, a requirement should be introduced whereunder all *pro deo* cases have to be assigned at least, say, two months in advance of the trial dates. Even better still would be to introduce a requirement that no warned and cautioned statement may be recorded from a person facing a capital charge until a lawyer has been brought in to protect his interests.

Fourthly, the Law Society could take steps to emphasise the grave professional responsibility of defence counsel in murder cases and it could take disciplinary measures in the event of gross dereliction of this duty.

In practice, it is unlikely that these measures would bring about significant improvement in the standard of *pro deo* defence work. Even if the money could be found to increase the fees it is probable that the increases would be too small to give much extra financial incentive to legal practitioners to treat this work on a par with ordinary private fee paying work.

The setting of a minimum period of experience before taking on *pro deo* cases would be likely to be unpopular with experienced legal practitioners. Because there is a relatively small number of legal practitioners in private practice this requirement would mean that experienced practitioners would have to carry an even heavier burden than they do at present. Additionally, there are some senior practitioners who do no court work and have specialised in areas such as conveyancing or patents and trademarks and it would be inappropriate to oblige these practitioners to do this sort of work. This decreases further the pool of experienced lawyers able to carry out *pro deo* work. The obligation imposed on the experienced legal practitioners to take on more *pro deo* cases would also be very commercially disruptive in their practices and would be likely to meet with resistance.

The other measures suggested above should be implemented but they are unlikely to have any dramatic positive impact on the way in which the system works.

The detection of mental inadequacy or disturbance

In Zimbabwe if a person was mentally disordered or disabled to such an extent that he was not responsible for his action at the time he committed a murder, he will not be hanged but will instead be sent to an institution for the criminally insane so that he can receive psychiatric treatment. If he was suffering from some lesser mental disturbance at the time he committed the murder this may constitute an extenuating circumstance justifying the imposition of a sentence other than the death sentence.

In Zimbabwe there is no system of automatic screening for mental disturbance of persons on trial for murder. Psychiatric investigations are only ordered in a relatively small number of cases. Sometimes defence or prosecution counsel requests such an examinations before trial; sometimes the trial court or the appeal court orders such an investigation where the behaviour of accused in court seems peculiar or the circumstances surrounding the crime are bizarre. If there is no obvious psychological problem then no psychiatric examination will take place. Because relatively few prisoners are ever professionally checked for psychiatric disorder there is a

danger that prisoners may slip through the net who are suffering from less evident mental disturbances which the system has failed to identify. Some of these may be sentenced to death and be hanged.
Even where psychiatric investigations are ordered it takes inordinate amounts of time to obtain reports because of the drastic shortage of psychiatrists in Zimbabwe. Often when the reports are done they are far too cursory to place reliance thereon. The court then has to order the carrying out of further psychiatric investigations and this leads to further protracted delays. In some cases where the Appeal Court has ordered a further, more thorough psychiatric examination, the further examination has revealed psychiatric problems not detected in the original examination.[11]

It is very probable that many more prisoners than the few who are medically examined in Zimbabwe have underlying mental problems. Studies done in other countries disclose that a substantial number of those who end up on death row are persons who suffer from mental problems of varying severity which had not been detected at the time of their trials and their appeals. For instance in one American Study[12] psychiatrists who conducted a careful study found that all 15 death row prisoners examined who were about to be executed suffered from various mental disturbances which had not previously been detected. The authors conclude that many condemned individuals probably suffer unrecognised severe psychiatric, neurological, and cognitive disorders relevant to considerations of mitigation.

The United Nations Human Rights Committee has indicated that in countries which retain death penalty must take steps to ensure that persons who are mentally disturbed at time of crime or at time of execution are not hanged. The United Nations Committee on Crime Prevention and Control recommended in 1988 that all member states retaining the death penalty be advised to eliminate the death penalty "for persons suffering from mental retardation or extremely limited mental competence whether at the stage of sentence or execution."[13] In 1986 the American Supreme Court firmly stated that the Constitution will have been violated if any prisoner is put to death while mentally incompetent. It is possibly arguable in Zimbabwe that the failure to have a proper psychiatric screening process in capital cases is a violation of the fair trial guarantee in s 18(2) of the Constitution.

The small pool of psychiatrists in Zimbabwe are not coping even with the present volume of requests for psychological examinations. More conscientious and responsible legal representation in *pro deo* cases would inevitably lead to an increasing demand for detailed, careful psychiatric examination. The courts themselves are also likely to make more numerous request for such examinations, particularly because of the expanding nature of the concept of diminished responsibility. If more defence

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11 Some of these cases are referred to in an article entitled "Investigating the mental condition of persons charged with murder" in 1989 Vol 1 No 4 *Legal Forum* 28 and in 1989 Vol 1 No 5 *Legal Forum* 27.

12 Reported in an article entitled "Psychiatric, neurological and psychoeducational characteristics of 15 death row inmates in the United States" in 1986 *American Journal of Psychiatry* 838.

13 See Amnesty International *When the State Kills: The Death Penalty: A Human Rights Issue* (1989].

lawyers were doing what they should be doing, namely to request psychiatric assessment whenever they have reason to believe that their clients suffer from a mental condition such as to render them not legally responsible for their actions or to reduce their degree of responsibility, the whole death penalty regime would be rendered unworkable at present as the few psychiatrist would just not be able to cope with the volume of work.

The erratic nature of the imposition of the death penalty

Some judges will find any excuse not to impose the death penalty whereas others are less reticent about imposing it. This means that whether extenuation is found will depend, to some extent, upon which judge is sitting. There is the additional variable that experienced and conscientious judges are more likely to uncover all the salient features in murder cases than inexperienced judges or judges who have such a heavy case load that they are unable to devote as much time to individual cases that they would like.

Conclusion

The present system for dealing with capital cases has many shortcomings and there is a danger that we will end up hanging persons who have not committed the murders; there is the even more pronounced danger that persons will hang where in fact there were circumstances surrounding the murders or there were personality features which would have led to extenuation being found had these circumstances or features emerged. Even apart from the moral objections to the death penalty, the dangers of hanging persons who do not deserve to be hanged makes the system insupportable.

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